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In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD, PETITIONERS

v.

VERMILION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE THIRD CIRCUIT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE[1]

QUESTION PRESENTED

Whether an artificially constructed navigable waterway, privately built and maintained and situated on private land but connecting with navig-

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[1]On October 2, 1978, the Court invited the Solicitor General to express the views of the United States concerning the issues presented by the petition for certiorari. We did so in December 1978 and the petition was granted on February 21, 1979. This is our brief, as amicus curiae, on the merits.

able waters of the United States, is a navigable water of the United States to which the public has a federally protected right of navigational access.

STATEMENT

Respondent Vermilion Corporation is the lessee of a large tract of land in Vermilion Parish, Louisiana. On this land is a network of canals that connects with the navigable waterways of the Gulf Intercoastal Waterway on the north, the Gulf of Mexico on the south, the West Cheniere Au Tigre Canal on the east, and the Rollover Bayou on the west (Pet. App. A-8). The canals were built in the 1940's and thereafter and have been maintained by respondents, its lessor, or their predecessors or agents (*id.* at A-21.)[2] The canals are sixty feet wide and eight feet deep, are subject to tidal fluctuations, and are navigable in fact, being regularly used by a variety of vessels (*id.* at A-8).[3]

Respondent brought this action to enjoin petitioners from entering the canals and engaging in fishing and shrimping in the canals (Pet. App. A-20, A-33). In their answers, petitioners interposed the affirmative defenses that the canals are "navigable waters of the United States" and thus "burdened with a paramount easement of use in favor of the public," and that respondent's attempt to restrain petitioners' use of the canals constituted an obstruction of navigable waters in violation of the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* (Pet. App. A-37 to A-38, A-41, A-45).

[2]The canals were built in the 1940's and thereafter (Dep. of John Donohue, May 10, 1977, at 10-20).

[3]Among other vessels, the canals are navigated by oilfield vessels, drilling barges and support vessels, towboats and tugboats and crew boats, and by work boats (see Dep. of John Donohue, May 10, 1977, at 20).

The trial court granted summary judgment for respondent (*id.* at A-2) over petitioners' objection that there were substantial issues of fact. Petitioners submitted an affidavit (*id.* at A-109 to A-110) asserting that, for as long as they could remember:

> the Humble Canal System has been used by fishermen, hunters, trappers, sportsmen, and generally anyone who wanted to use same. Broussard's and Hazel's Landings have been public landings and launch ramps on the Humble Canal System for years.

The affidavit also asserted:

> Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system in the area of Pecan Island, for example, Little Rollover Bayou and Freshwater Bayou, were actually used for purposes of transporting mail, transporting cattle, and transporting people, to and from Pecan Island on various kinds of small vessels. These natural waterways only ceased to be useable for these purposes after Humble developed its artificial waterway system.

The Louisiana district court granted respondent's summary judgment motion. It held that there was no right of public access to the canal systems because they were constructed with private funds on

private property, were privately maintained, and their use had been restricted to persons given permission by respondent (*id.* at A-2). The court rejected as a matter of law the claim that the diversion of navigable waters of the United States made the canals a public waterway (*id.* at A-2).[4] The Louisiana Court of Appeal, Third Circuit, affirmed on the same grounds (*id.* at A-9 to A-11). The Supreme Court of Louisiana denied review (*id.* at A-18 to A-19).

SUMMARY OF ARGUMENT

I

Public navigation on all navigable waters is a historic right. English common law held that the beds of navigable waters were owned by the Crown in trust subject to a servitude of public navigation. When this country was colonized, Crown charters

[4]It is undisputed that prior to the building of the canal system there were several naturally navigable channels in the area. (See Dep. of John Donohue, May 10, 1977, at 15-17; Aff. Norman Vaughn, May 23, 1977, at 1-2 (Pet. App. A-109 to A-110).) It also seems undisputed that these ceased to be passable after the canal system was built due to an accumulation of silt and/or spoil in the natural channel (Dep. of John Donohue at 15). The dispute is over whether the blockage resulted from the creation and maintenance of respondent's canal system (*ibid.*). It is possible that dredging in the canal system, has caused silt to settle in the original bed. (See *United States* v. *Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974) (silt accumulation in natural channel due to dredging.)) There is no need to speculate on that point, however, for petitioners' claim that the maintenance of the canal system destroyed the prior channel was rejected as a matter of law as an insufficient defense and must be taken as true at this stage in the proceedings.

were also deemed to convey title to the beds of navigable waters in the American Colonies subject to a servitude for public navigation. *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413, 414 (1842). Upon the American Revolution, title to the beds of such streams passed to the states, subject, again, to the servitude for public navigation. *Shively* v. *Bowlby*, 152 U.S. 1, 14-15 (1894).

Of course, a common-law rule, however historic, may be altered by the states so long as no federally protected right is abridged. There is no federal statute of nationwide applicability which provides that the public may navigate the navigable waters of this country. Such a statute has never been thought necessary, however, for it has been taken for granted from the first that the Commerce Clause itself precludes the states from conferring private monopolies on navigation.

"All America understands," Chief Justice Marshall wrote in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824), "the word 'commerce' to comprehend navigation. It was so understood * * * when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government * * *." In the Commerce Clause, the states surrendered their common-law power to eliminate the public navigational servitude with respect to the "navigable waters of the United States," that is, the rivers and streams which directly or indirectly together form a continuous highway for actual or potential commerce between the states. Although the states may regulate activities on the navigable waters, the Commerce Clause prohibits private owner-

ship of the streams themselves. As the Court has held, the title to the bed of navigable waters is, by virtue of the Commerce Clause, "subject absolutely to the public right of navigation * * *." *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U.S. 82, 87 (1913). The navigable waters of the United States are "the public property of the nation," and the notion that "the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 63, 69 (1913).

Were the rule otherwise, navigation would be severely impeded. The beds of navigable waters may be vested in hundreds of private or public owners. Ownership may even shift from owner to owner under the various state rules of avulsion and accretion. See *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). Navigation on these waters would be a futile exercise if vessels were required to purchase the right to navigate over the bed of each owner. The difficulty in locating each owner, the cumulative burdens they might impose, and the risk of a "hold-up" by a single owner would rob the "highway of commerce" of all of its utility.

Congress, moreover, has long taken for granted the public right of navigation and has premised decades of legislation on the premise that, although the federal government may restrict public navigation, the Commerce Clause of its own force precludes any state from conferring a private monopoly over the navigable waters of the United States. Since at least 1816, for example, Congress has appropriated billions of dollars in periodic "rivers and harbors"

bills for the improvement of harbors, rivers, creeks and lakes by the Secretary of War (now the Secretary of the Army). To protect this investment and to preserve the waterways of this country, Congress enacted a series of laws, eventually culminating in the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, prohibiting any obstruction to the navigable capacity of the navigable waters of the United States. What is more, 33 U.S.C. 565 permits a riparian owner to make river improvements approved by the Corps of Engineers at his own expense and risk so long as public navigation is not impeded and no toll is charged, and 33 U.S.C. 1 authorizes the Secretary of the Army to regulate the use, administration and navigation of the navigable waters of the United States. Those statutes, and others, assume the proposition that the public is entitled to navigate the waters so improved, protected or regulated. To hold that the states may exclude the public from navigable waters of the United States within their borders would destroy the *raison d'etre* of this and much similar legislation.

In short, the public has a right to navigate all navigable waters of the United States subject only to any federal laws or regulations which deny access.

II

Respondent's canal system is a navigable water of the United States. The Court's traditional test of navigability is whether the stream is sufficiently navigable to carry commerce or could be made so with reasonable improvements. The canals in question plainly meet this test inasmuch as they are in fact navigable and in fact carry commerce.

Moreover, although this alone is sufficient to demonstrate the navigability of the canal system, the canals also satisfy the older "ebb-and-flow" test for navigability inasmuch as the canals are subject to the tidal fluctuations of the Gulf of Mexico. The canal system is a "navigable water of the United States" because it connects directly to the Gulf of Mexico and thereby forms part of the continuous highway of interstate commerce among the states. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563–564 (1870); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 406–410 (1940).

The fact that the canal system was built on private land and with private funds does not change its character as a navigable water of the United States. To allow such an exception would reintroduce the very evil that the navigational servitude is designed to avoid. It is not always easy to tell whether a waterway is artificial or natural, or whether it is built over a navigable stream (or one which might be made so with reasonable improvements). The riparian owner would have every incentive to resolve such factual issues in his favor and to assert a private monopoly over the waters adjoining his land and thereby appropriate for his exclusive use what in fact belongs to the public. These problems are avoided by adhering to the traditional definition of the navigable waters of the United States and treating "private" canals no differently from natural waterways.

This does not necessarily mean that such canals must admit any and all members of the navigating public. Under 33 U.S.C. 1, the Corps of Engineers

may issue regulations for the use and navigation of the navigable waters of the United States. The "owner" of a canal may request the Corps to issue a regulation restricting public access, just as the Corps has done in regulations restricting public access at or near military facilities. See 33 C.F.R. Part 207. If the Corps determines, after a public hearing, that the interests of navigation would not be adversely affected and that the public interest would be served by such a restriction, then it may issue such a regulation. Such regulations, published in the Code of Federal Regulations, would give notice to all of the navigating public of the restriction.

ARGUMENT

Our only task is to determine whether the injunction issued by the Louisiana courts preventing petitioners' vessels from entering the canal constructed by respondent's lessor is inconsistent with overriding federal law. There are two distinct tests we can apply in making that assessment. One approach is to ask whether the state rule on which the judgment is premised impermissibly trenches on the prerogative of the United States to regulate navigation on the national waterways. But the more direct question is whether the injunction is void as an invasion of the federal right of the public to navigate such waterways. We have chosen that starting place.

At the outset, however, we stress that the two approaches are, for the most part, different paths to the same destination. There is much common

ground. Both the federal power of regulation and the public right of navigation (insofar as it is a federally protected right) attach to all "navigable waters of the United States," a description that includes at least all navigable waters connected directly or indirectly to the sea or to inland waterways that cross state boundaries. Moreover, although the power and the right have different historical origins and are not always evidenced in the same statutes, they share a constitutional anchor in the Commerce Clause. This convergence is relevant because it authorizes us to invoke rulings defining the breadth of the regulatory power as precedents on the question whether the public right of navigation embraces artificial waterways traversing private land.

With this preamble, we turn to the basic proposition: that the navigable waters of the United States are impressed with a navigational servitude in favor of the public which the Constitution and federal law protect against invasion by state or individual action.

I. THE PUBLIC ENJOYS A FEDERALLY PROTECTED RIGHT OF NAVIGATION OVER THE NAVIGABLE WATERS OF THE UNITED STATES

1. The federal navigational servitude descends directly from the English common law. Chapter 32 of Magna Carta confirmed as one of the fundamental "liberties of England," which neither King nor subject could abridge, the right of the public to travel

on the navigable streams. W. McKechnie, *A Commentary on the Great Charter of King John* 343 (Glasgow 1914).[5] English common law held that the title to the seashore and the beds of navigable waterways were vested in the Crown or its grantees (*jus privatum*), but that, whether the Crown retained title to the soil or had granted it out, it was subject to a servitude or right of navigation in favor of the public (*jus publicum*). *Shively* v. *Bowlby*, 152 U.S. 1, 10–14 (1894). Indeed, the public right of navigation was so well entrenched that it survived even in Stuart times when the royal prerogative tended to swallow up most common privileges. We need only quote Sir Matthew Hale, Lord Chief Justice during the reign of Charles II (*De Jure Maris*, in Hargrave, *Tracts Relative to the Law of England*, Vol. 1, ch. III, at 8–9 (1787)):

> Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of

[5]The right of public navigation, however, dates at least from the Roman Empire. *Institutes of Justinian*, Bk. 2, Tit. 1, §2; see *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950).

the king's propriety, are public rivers *juris publici*.[6]

The common law of England on this subject was adopted in the colonies. Crown charters were deemed to convey title to the beds of navigable waters in public trust, subject to free use by the public for navigation and fishery. *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413, 414 (1842). Upon the American Revolution, all of the title and interest of the Crown in the beds of the sea and navigable waterways vested in the several states, subject, however, to the servitude for public navigation. *Shively* v. *Bowlby*, *supra*, 152 U.S. at 14–15; *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 229 (1845); *Martin* v. *Waddell*, *supra*, 41 U.S. (16 Pet.) at 414. And, of course, the same principle applies to later admitted states by virtue of equal-footing doctrine. See *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 228–229; *Mumford* v. *Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Weber* v. *Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65–66 (1873); *Knight* v. *U.S. Land Ass'n*, 142 U.S. 161, 183 (1891); *Shively* v. *Bowlby*, *supra*, 152 U.S. at 26; *United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377–378 (1977).

No doubt, the states have been free since the beginning to alter the common-law rule that governs ownership of river beds. *E.g.*, *Shively* v. *Bowlby*, *supra*, 152 U.S. at 14-15, 18–26; *Oregon* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 378. So, also, except as they relinquished the power, the states presumably might have abolished the public servitude of navigation, however venerable. The question, then, is whether there has been such a surrender with respect to the system of waterways that constitute the arteries of commerce and travel connecting the states — what came to be called the "navigable waters of the United States."

2. Even before the Constitution, the right to pass freely from state to state was secured to the people

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[6] Later in the same treatise (*id.*, ch. VI, at 36), the point is restated as a caveat to the proposition that a private individual may "have the propriety of a navigable river part of a port." This, says Sir Matthew, must be taken with the following "caution:"

> That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions, * * * [f]or the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.

Sir Mathew Hale treats the public right of fishing in tidal waters and arms of the sea very differently. According to him, the right of fishing "is originally lodged in the crown" (*id.* at ch. IV, at 11) and it may be reserved to the King, or granted out as an exclusive private right to an individual, or acquired by prescription (*id.*, ch. IV, at 11; ch. V, at 17, 18). The public right of navigation, by contrast, is not derived from the Crown but from "common law," is not susceptible of reservation or grant or appropriation, and it always takes precedence over fishing rights, public or private (*id.*, ch. I, at 6; ch. II, at 8; ch. V, at 21, 22). Although Hale's view that private fisheries in tidal waters could be acquired by royal grant after 1189 has since been repudiated (*e.g.*, *Attorney General for British Columbia* v. *Attorney General for Canada* [1914] A.C. 153, 169–171), English law continues to recognize private fisheries in tidal waters (*e.g. Malcomson* v. *O'Dea* (1863) 10 H.L. Cas. 593) while upholding the public's right "to pass up and down" the channels of navigable rivers (*e.g. Williams* v. *Wilcox* (1838), 8 Ad. & E. 314., 112 Eng. Rep. 857, 864).

of the confederacy. Articles of Confederation, Art. IV, 1 Stat. 4. A natural corollary is that the citizens of every state should have access to traditionally public highways and waterways for that purpose. Indeed, the Northwest Ordinance of 1787 expressly provided that "[t]he navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free," to citizens of the United States and inhabitants of the Territory alike. Sec. 14, Art. IV. This at least suggests that the public servitude of navigation was viewed as an aspect of the right to travel interstate.

In that event, it cannot be supposed that federal protection of the right was withdrawn when a "more perfect Union" was formed in 1789. Notwithstanding the omission of any express provision in the Constitution, the Court has characterized as "firmly established" the proposition that the "right of interstate travel is constitutionally protected * * * and is assertable against private as well as governmental interference." *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971). See also, *United States* v. *Guest*, 383 U.S. 745, 757–760 (1966); *Shapiro* v. *Thompson*, 394 U.S. 618, 629–631 (1969). So here. But we need not pursue the point further. For, whether any other provision of the Constitution may be relevant, the right of navigation finds protection in the Commerce Clause.

It is, of course, long settled that navigation on the waters that connect the states to each other, or this Nation to others, is within the objects reached by the Commerce Clause. "All America understands," Chief Justice Marshall wrote in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824), "the word 'commerce,' to comprehend navigation. It was so understood * * * when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government* * *."

From the first, Congress acted under the Commerce Clause to preserve and to enhance public navigation. By the Act of August 7, 1789, ch. 8, 1 Stat. 50, it reenacted the Northwest Ordinance which, as we have seen, formally declared the navigable waters of the territory connecting with the Mississippi and the Saint Lawrence to be "common highways, forever free" to all Americans. And similar provisions were incorporated into laws establishing new territories and Enabling Acts admitting at least nine states. See Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 Land and Water L. Rev. 391, 416 n. 101 (1970).[7] As this Court later explained, these provisions announced no special rule for the states and territories involved. See *Pollard's Lessee* v. *Hagan*, *supra*, 44 U.S. (3 How.) at 230; *Cardwell* v. *American Bridge Co.*, 113 U.S. 205, 211 (1885); *Hamilton* v. *Vicksburg, S. & Pac. R.R.*, 119 U.S. 280, 284–285 (1886); *Huse* v. *Glover*, 119 U.S. 543, 546-548 (1886); *Coyle* v. *Oklahoma*, 221 U.S. 559, 570-574 (1911). Rather, they expressly confirmed that navigable rivers should remain "highways equally open to all persons without preference to

[7]See, *e.g.*, 1 Stat. 491; 2 Stat. 235, 279, 642, 666, 703; 4 Stat. 290; 11 Stat. 166; 14 Stat. 421. See generally, *Economy Light Co.* v. *United States*, 256 U.S. 113, 118–120 (1921).

any"—not used "by private parties to the exclusion of the public"—and that there must be no "farming out of the privilege of navigating them to particular individuals, classes, or corporations." *Huse* v. *Glover*, *supra*, 119 U.S. at 547, 548. Accord, *Cardwell* v. *American Bridge Co.*, *supra*, 113 U.S. at 212; *Hamilton* v. *Vicksburg, S. & Pac. R.R.*, *supra*, 119 U.S. at 284-285; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 11-12 (1888).[8]

The Second Congress enacted the Enrollment and Licensing Act, ch. 1, 1 Stat. 287, 46 U.S.C. 11 *et seq.*, under which federally licensed vessels are entitled to engage in the coastwide trade in the navigable waters of any State. See *Gibbons* v. *Ogden*, *supra*; *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 272-282 (1977). And, in 1838, Congress passed a law prohibiting, without a federal permit, any commercial transportation by steamboat upon "the bays, lakes, rivers or other navigable waters of the United States." Act of July 7, 1838, ch. 191, Section 2, 5 Stat. 304.

Since at least 1816, moreover, Congress has appropriated billions of dollars in annual "rivers and harbors" acts for the improvement of harbors, rivers, creeks and lakes for navigation under the direction of the Secretary of War (now the Secretary of the Army). See 20 Op. Att'y Gen. 488, 498 (1892).

[8]Insofar as, contrary to our primary submission, the "forever free" clauses of the Enabling Acts do more than exemplify the public right of navigation already protected by the Commerce Clause, we would invoke the language of the Act applicable to Louisiana, 2 Stat. 701, and the decisions just cited as foreclosing the State from creating or implementing any supposed private right to exclude the public from any part of the navigable waters of the United States.

In 1890, Congress reported that "there is no money expended by the Government which is so much in the interest of the people as that expended in the improvement of the water-ways of the country." S. Rep. No. 1378, 51st Cong., 1st Sess. 3 (1890); H. R. Rep. No. 1488, 51st Cong., 1st Sess. 3 (1890). To protect the national investment in "river and harbor" improvements and to prevent the obstruction of the navigable waters, Congress prohibited, in a series of Acts culminating in the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, any bridges, dams, or other structures or work not authorized by the federal government which would impair the navigable capacity of the "navigable water of the United States."[9] By this legislation, "Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent." *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, 708 (1899). And, since 1894, the Secretary of the Army (or the Secretary of War) has been authorized "to prescribe such regulations for the use, administration, and navigation

[9]Section 401 prohibits the construction of bridges, dams, dikes, or causeways over or in any port, roadstead, haven, harbor, navigable river or other navigable waters of the United States without federal consent. Section 403 prohibits any obstructions to the navigable capacity of any port, roadstead, haven, harbor, canal, navigable river or other navigable waters of the United States without the prior approval of the Corps of Engineers or Congress. Section 404 authorizes the Secretary of the Army to establish harbor lines beyond which no piers or other works may be constructed. Section 409 makes it unlawful to tie up or anchor vessels so as to prevent passage of other vessels and requires owners to remove sunken vessels. Section 414 authorizes the Secretary of the Army to remove sunken vessels from rivers, lakes, harbors, sounds, bays, canals or other navigable waters.

of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property * * * ." 33 U.S.C. 1; see 33 C.F.R. Part 207.[10]

It is unnecessary, for our purposes, to chronicle in further detail the vast amount of legislation filling Titles 33, 46 and 49 of the United States Code on the subject of navigation. What sufficiently emerges is that Congress has, since the earliest days of our nation, invoked its powers under the Commerce Clause to protect, improve and encourage the use of the navigable waters of the United States as "highways of commerce." To be sure, there is no general statute expressly bringing under federal protection the right of *all* people (and not only those holding a federal license to use *all* the navigable waters of the United States (and not only waterways in particular States), free from *all* impediments (and not only physical obstructions). But this merely reflects what has always been taken for granted: that the Commerce Clause itself recognizes the public right to navigate the national waterways and that the congressional role is not to reestablish the servitude but only to vindicate it against particular threats and to regulate its exercise in the public interest. All our legislation is founded on this premise.

3. The jurisprudence of this Court confirms this understanding. In *Gibbons* v. *Ogden*, *supra*, 22 U.S. (9 Wheat.) at 209, the Court came close to holding that

[10]Since 1972, the Coast Guard has also been authorized to issue such regulations for ports and waterways covered by the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, 33 U.S.C. 1221 *et seq.*, and 46 U.S.C. 391a.

the Commerce Clause, of its own force, deprived the states of the power to exclude interstate navigation. The Court avoided the issue by holding that the federal license precluded any state exclusion of the out-of-state vessel. *Id.* at 210-222. In later decisions, however, the Court firmly adopted the view that the navigable waters of the United States were impressed with a navigational servitude in favor of the public. Thus, in *Scranton* v. *Wheeler*, 179 U.S. 141, 160, 163 (1900), in the course of holding that the owner of the bed of a navigable stream was entitled to no compensation for a taking of his portion of the bed for a pier, the Court held that such land was subject to a superior federal servitude in favor of public navigation:

> The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. ***
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> * * * * *
>
> So that whether the title to the submerged lands of navigable waters is in the State or in the ripa-

rian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Because all navigable waters are "subordinate to the public right of navigation," *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62 (1913), and are "the public property of the nation," *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865), the Court has regularly held that no compensation need be paid to affected landowners for economic losses resulting from exercise of the government's regulatory power over navigable waters. Thus, no compensation need be paid for the loss in water power due to government impairment of the flow to a power company, *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 76; *United States* v. *Twin City*

Power Co., 350 U.S. 222, 226-227 (1956); nor the loss in water power due to the government's raising of the high water marks so as to reduce the head, *United States* v. *Willow River Co.*, 324 U.S. 499 (1945); nor for the loss of fishing and boating access to a navigable creek that is blocked as a result of federal improvement of another waterway, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); nor for the potential value of land as a port site when it is condemned for a lock and dam project, *United States* v. *Rands*, 389 U.S. 121, 123 (1967). Accord, *South Carolina* v. *Georgia*, 93 U.S. 4 (1876); *Eldridge* v. *Trezevant*, 160 U.S. 452 (1896); *Gibson* v. *United States*, 166 U.S. 269, 271 (1897); *United States* v. *Chicago, M., St. P. & Pac. R.R.*, 312 U.S. 592, 595-596 (1941).

Likewise, the government may order an owner of a bridge over a navigable water of the United States to remove or modify it in order to improve public navigation without paying compensation, for any bridge erected over such waters is subject to the paramount authority of the government to require its removal in the interest of navigation. *Union Bridge Co.* v. *United States*, 204 U.S. 364, 400 (1907); *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U.S. 251, 258-264 (1915) (same; private wharf). And, although the public right of access to navigable waters of the United States may only be restricted by the national government, its existence also permits a state to make navigational improvements within the channel without compensating riparian owners for the loss of the water flow or for diminished access to a previously usable channel. *Transportation Co.* v. *Chicago*, 99 U.S. 635 (1878); *Manigault* v. *Springs*, 199 U.S. 473

(1905).[11] See also *Mobile* v. *Kimball*, 102 U.S. 691, 699 (1880); *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288, 295 (1887).

In short, under *federal* law, the notion that "the running water in a great navigable stream is capable of private ownership is inconceivable." *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 69. Title to the bed of navigable waters is "subject absolutely to the public right of navigation ***." *Lewis Blue Point Oyster Co.* v. *Bridge*, 229 U.S. 82, 87 (1913).

4. We have no occasion here to determine precisely how far the Commerce Clause of its own force, or federal legislation, preempts state regulation of navigation or navigable waterways. See, *e.g.*, *Douglas* v. *Seacoast Products, Inc.*, *supra*.[12] Much less need we

[11]The improvements at issue in these two decisions were made before a federal permit was required under the 1899 Act or its predecessors. Therefore, because the state improvements were made without any federal authorization and solely on the authority of the states, there was no affirmative exercise of the navigational servitude by the federal government. The navigational servitude, however, of its own force, precluded any private property interest in the streams and the Court held that the states were not required to pay compensation.

[12]And see *Mayor of New York* v. *Miln*, 36 U.S. (11 Pet.) 102 (1837) (vessel master may be required by local law to report names of landing passengers); *Cooley* v. *Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299, 316–318 (1851) (state may impose pilotage requirement); *Smith* v. *Maryland*, 59 U.S. (18 How.) 71 (1855) (state conservation law may limit fishing implements that may be used to take oysters); *Manchester* v. *Massachusetts*, 139 U.S. 240 (1891) (same); *Packet Co.* v. *Catlettsburg*, 105 U.S. 559, 563 (1881) (city may erect wharf, collect a wharfing fee, and prohibit landings other than at wharf); *Cummings* v. *Chicago*, 188 U.S. 410 (1903) (federal permit to make river improvement does not suspend holder's obligation to obtain state permit); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960) (state may require vessels to use smoke abatement equipment); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 179–180 (1978) (state may require vessels to be escorted by tugs).

debate the correctness of those Nineteenth Century decisions that provoked the enactment of the Rivers and Harbors Acts of 1890 and 1899.[13] It is enough to notice that this Court has never condoned any attempt by state law to create a monopoly of navigation in any part of the national waterways. On the contrary, the Court has made clear that the Commerce Clause itself outlaws discriminatory rules that favor one group over another in the use of those waterways, even when the beneficiaries include all the citizens of the State. See *Douglas* v. *Seacoast Products, Inc.*, *supra*, 431 U.S. at 283–286. Cf. *Hughes v. Oklahoma*, No. 77–1439 (Apr. 24, 1977), slip op. 12–16. *A fortiori*, the Commerce Clause forbids a landowner from closing off for

[13]During the Nineteenth Century, a number of states authorized dams or bridges within their borders across navigable waters of the United States, thereby completely or partially blocking public navigation. The Court sustained such laws on the ground that, until Congress exercised its dormant power, the states were free to regulate commerce within their borders at least to the extent of authorizing dams and bridges which might, in the judgment of the states, best serve local commerce. *Willson* v. *Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (dam built to drain marsh); *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713 (1865) (non-drawbridge over Schuylkill River); *Pound* v. *Turck*, 95 U.S. 459 (1877) (dam); *Escanaba Co.* v. *Chicago*, 107 U.S. 678 (1882) (regulation of hours of day that drawbridge must be opened and closed); *Cardwell* v. *American Bridge Co.*, 113 U.S. 205 (1885) (non-drawbridge over American River); *Hamilton* v. *Vicksburg, S. & Pac. R.R.*, 119 U.S. 280 (1886) (state navigation improvements destroyed prior channel); *Sands* v. *Manistee River Improvement Co.*, 123 U.S. 288 (1887) (state navigation improvements destroyed prior channel); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888) (state drawbridge across Willamette River).

It may be questioned whether all of these decisions would survive today. Cf. *Hughes* v. *Oklahoma*, No. 77–1439 (Apr. 24, 1979). But, in any event, none of the cases sustains a monopoly of navigation in waters that are part of the national waterway system, much less permits the riparian landowner to reserve such waters to his own vessels.

his mere private benefit a part of the navigable waters of the United States, and likewise restrains the state from supporting such action.

It is hardly necessary to add that conditioning the right of navigation in national waters on the consent of riparian owners and the vagaries of state trespass laws would effectively destroy the public servitude. The waterways which physically interconnect the states form a continuous highway for navigation. The beds to these waterways may be vested in hundreds of private or public owners. Ownership of the bed of navigable waters may be bought and sold. It may even shift from owner to owner by virtue of the state law of avulsion, accretion and various state law exceptions thereto. *Oregon* v. *Corvallis Sand & Gravel Co.*, *supra*, 429 U.S. at 367 & n.2. The difficulty in locating each owner, the cumulative burdens they might impose, and the ever-present risk of a "hold up" by a single owner would rob the highway of commerce of all of its utility.

Precisely these considerations led the Court to hold in *United States* v. *Causby*, 328 U.S. 256, 260-261 (1946), that the navigable airspace of the United States is a public highway, open to the aviating public, without the need to obtain the permission of the individual landowners whose land is crossed:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator

> to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim. [Footnote omitted.]

Thus, the Court held that land was impressed with a servitude in favor of aviation which might be exercised without any compensation to the owner of the land.

At issue in *Causby* was the Air Commerce Act of 1926, 49 U.S.C. 1304, 1508, which established "complete and exclusive national sovereignty in the air space" over this country and recognized in every citizen "a public right of freedom of transit in air commerce" through the "navigable air space of the United States." Significantly, Congress patterned the legislation on the navigational servitude:

> [T]he legal features of the bill have their foundation in existing principles of law. * * * The declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable or nonnavigable waters. *The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent or subjacent soil.*

> The whole framework and, in many cases, the very language of the bill may fairly be said to be merely the application to air transportation of provisions of statutes and principles of law long established as to water transportation.

H.R. Rep. No. 572, 69th Cong., 1st Sess. 10 (1926) (emphasis added).[14]

In sum, the universal assumption has been that the navigable waters of the United States are open for public navigation and that no one may appropriate to private ownership the right to navigate such waters, whatever state law may provide. This public servitude, always part of the common law, has been recognized from the earliest days of the nation. For a century and a half, it has been the *raison d'etre* of annual congressional appropriations to improve the navigability of countless creeks and streams throughout the country. It has been the basis for federal legislation prohibiting obstruction to navigable waters of the United States. It was invoked when Congress was "recognizing and declaring" an analogous navigational servitude in the airspace of the United States. It is an ancient right, protected by the Commerce Clause of the Constitution. In this respect, our fundamental charter carries forward the promise of Magna Carta:

[14] *Causby* and the Air Commerce Act are not distinguishable because the right of access was "recognized and declared" by statute. If the Commerce Clause of its own force did not impress the servitude on private lands, then the states would be free to create private property rights in such airspace and Congress, though it could "take" such airspace by statute, would nonetheless be required to pay compensation. *Causby* holds that no compensation need be paid for use of the airspace notwithstanding any state-created property interests. This necessarily holds as well that the Commerce Clause, of its own force, precluded such interests.

Just as in England neither King nor lesser Lord could prevent navigation of public rivers, so here, the liberty of passing over the navigable waters of the United States belongs to all the people, from whom it can be taken, if at all, only by authority of the nation itself.

II. RESPONDENT'S CANAL SYSTEM IS A PART OF THE NAVIGABLE WATERS OF THE UNITED STATES

In the preceding pages, we have sought to demonstrate that, absent federal regulation modifying the rule in particular instances, the public servitude of navigation applies to all the "navigable waters of the United States." It only remains to show that respondent's canal system fits that description.

1. The canal system satisfies every traditional definition of a navigable water of the United States. From the beginning, the admirality and maritime jurisdiction of the federal courts—which was established to resolve navigational or maritime disputes arising on the navigable waters of the United States—has comprehended all waters which ebbed and flowed with the tide. *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). That test is met here (Pet. App. A-8).

Nor is that all. As we have seen (*supra*, page 11), even in England there were "fresh" rivers that did not "flow and reflow" and nevertheless were deemed "common highways for man or goods or both." All the more so in this country, with its extensive waterways which are not subject to the tide. Thus, in *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 454-456 (1851), admiralty and maritime jurisdiction was ex-

tended to all waters navigable in fact. Here, too, respondent's canals fully satisfy the criterion, being some sixty feet wide and eight feet deep (Pet. App. A-8).

The "navigable waters of the United States," as opposed to state navigable waters, are those which form "by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *Gilman* v. *Philadelphia*, *supra*, 70 U.S. (3 Wall.) at 724; *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 63; *United States* v. *Chicago, M., St. P. & Pac. R.R.*, 312 U.S. 592, 595-596 (1941). It does not matter that the river in question lies wholly within a single state. Every navigable waterway that connects with the waters leading to other states is navigable water of the United States. *The Daniel Ball*, *supra*, 77 U.S. (10 Wall.) at 563-564. Once again, the canal system in suit meets the test. It is in fact used to support commerce (oil exploration, fishing, hunting) (Pet. App. A-8), and it leads into the Gulf and the Intercoastal Waterway (*ibid.*).

This would be the end of the case except for the claim that the public servitude is inapplicable because the canals were built on private land at the expense of the landowner. We turn to that argument.

2. With unaccustomed tentativeness, and without the usual citation of precedent, Sir Matthew Hale wrote that when a man "at his own charge makes his own private stream to be passable for boats or barges"—without blocking the original waterway or obtaining a charter to collect tolls—it "seems" he may reserve the water "to his own private use." *De Jure*

Maris, *supra*, ch. III, at 9. This dictum has been followed uncritically by some commentators. *E.g.*, J. Gould, *Waters* 209 n.5 (3d ed. 1900). But every indication is that Hale's opinion did not accurately represent the common law on this point—any more than when he asserted the continuing prerogative of the Crown to create several fisheries in tidal water. See note 6, *supra*. Indeed, the only reported English decisions we have uncovered appear to look the other way. See *Case* v. *The Midland Railway Company*, 27 Beavan 247 (1859); *Simpson* v. *Attorney-General*, [1904] A.C. 476.[15] See also, H. Coulson & U. Forbes, *The Law Relating to Waters* 340, 344 (ed ed. 1910).[16]

At all events, in this particular we cannot be bound by rules developed for the very different requirements of a relatively small island whose navigable waterways are largely tidal. As already noted, this nation early abandoned a definition of navigability that rested in large measure on the influx of the sea. Our own rule is that navigable—and therefore public—waterways include those as to which "artificial aids" are needed to "make the highway suitable for use before commercial

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[15]In this case the House divided (3 to 2) on the question whether the owner of locks was required to repair them and render his system navigable once more. Although the Lords of Appeal in the majority answered in the negative, the court was unanimous in concluding that, while operating, the lock system must be open to all. *E.g.*, [1904] A.C. at 482-483 (Lord Macnaghten, joined by Lord Robertson and Lord James), 501 (Lord Davey), 513 (Lord Lindley).

[16]Not surprisingly, the question seldom arose. For the most part, in England as in this country, most private undertakings were canals constructed for the purpose of admitting the public on payment of a toll and authorized by special charter which required the channel to be kept open.

navigation may be undertaken." *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 407 (1940). And by explicit command of statute, private improvement of such potentially navigable waterways opens them to toll-free passage. 33 U.S.C. 565.[17]

Our case, it will be said, is different in that the canals in suit did not "improve" an existing channel, but created a new waterway where no stream of any kind existed before. That is a somewhat artificial characterization. The critical fact is that respondent's canal system is connected to pre-existing arteries of interstate commerce and is, therefore, an integral part of those waterways. The bed may be new, but the water that flows in respondent's canals comes from the Gulf or the Intercoastal Waterway and creates new arms to those commercial highways. For the purpose of the public right of navigation, it cannot matter whether the new works that extend the navigable stretch of an interstate waterway follow an old formerly impassable channel or cut through virgin soil. See *United States Geophysical Company* v. *Vela*, 231 F.2d 816, 821 (5th Cir. 1956).

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[17]The cited provision, enacted as part of the Rivers and Harbors Act of 1902, ch. 1079, Section 1, 32 Stat. 371, reads as follows (emphasis added):

> Any person or persons, corporations, municipal or private, who desire to improve any navigable river, or any part thereof, at their or its own expense and risk may do so upon the approval of the plans and specifications of said proposed improvement by the Secretary of War and Chief of Engineers of the Army. The plan of said improvement must conform with the general plan of the Government improvements, *must not impede navigation, and no toll shall be imposed on account thereof*, and said improvement shall at all times be under the control and supervision of the Secretary of War and Chief of Engineers.

What is more, cutting a new channel off an existing waterway must often deflect the flow in such a way as adversely to affect an older bed, which may silt up or be deprived of sufficient water to support navigation. Indeed, that is the unchallenged fact in this case. In those circumstances, it is generally agreed that the substitute channel—whether natural or artificial—must be made to bear the public navigational servitude. See, *e.g.*, Hale, *De Jure Maris*, *supra*, at ch. III, at 10; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 634-635 (1912); *Dwinel* v. *Barnard*, 28 Me. 554, 562 (1848). Yet, after the passage of time, it must often be impossible accurately to reconstruct the sequence of events and to identify cause and effect.

To permit the "artificial" or "natural" character of additions to the navigable waters of the United States to determine whether they shall be "private" or "public" would reintroduce the very evil that the navigational servitude is designed to avoid and would impose an intolerable and unworkable burden on navigation. It is not always easy to tell whether a waterway is artificial, natural, or partly both. A canal might be built over a stream. Years afterwards, it will be difficult to determine whether the original stream was navigable or could be made so with reasonable improvements. At all events, the navigating public cannot be expected to know whether the opening to navigable channels is "natural" or "man-made," and, if the latter, whether the channel replaced a pre-existing navigable waterway. No doubt, signs posted by the landowner could identify private canals, albeit only at the last moment. But it does not seem satisfactory to rely on a landowner who has every incentive to resolve any factual

ambiguity in his favor and thereby appropriate for his private use what in fact belongs to the public.[18]

[18] Although it was not always so viewed, respondent's canal system plainly is a navigable water of the United States under the current definition used by the Corps of Engineers. 33 C.F.R. Part 329 (reproduced in the Appendix).

The first record of respondent's canal system in the files of the District Engineer in New Orleans appeared in 1942. On May 15, 1942, the Corps of Engineers issued a permit pursuant to 33 U.S.C. 403 authorizing Humble Oil Company (now Exxon Corporation), respondent's lessor, to dredge canals connecting with certain navigable waters of the United States in the area in question. Condition (e) of the permit provided that "no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure." The plans and specifications approved by the Corps show proposed canals connecting with and, in some instances, replacing pre-existing natural waterways. After the work approved by the 1942 permit was completed, Humble (or Exxon) advised the Corps from time to time that it desired to dredge additional canals to connect with the initial canal but not to intersect natural waterways. The Corps responded with "letters of no objection" for such work. During this period the Corps did not require a permit to dredge an artificial canal on private land which only connected with another privately constructed canal. In 1972, however, the Corps revised its definition of "navigable waters of the United States" to include artificial canals which connected only with other canals. See 33 C.F.R. 209.260(g)(1) (1973). Since January 1974, the Corps has required Exxon Corporation to obtain a permit to dredge new canals even though the canals connect only to its other canals and not to any natural waterways. These permits have included conditions of public access similar to condition (e) in the 1942 permit. The Corps' most recent regulations, moreover, contain a "nationwide" permit approving work such as that performed pursuant to the "letters of no objection." 33 C.F.R. 322.4(g) approves all "[s]tructures of work completed before 18 December 1968 or in waterbodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation." Thus, all of respondent's canal system is now subject to the condition that there be no interference with navigation or any attempt to forbid full and free use by the public of all navigable waters at or adjacent to the canals.

3. Nor are we persuaded by the suggestion that the public right of navigation must give way in order to provide an incentive to the useful work of landowners who construct a canal or other waterway on their property at their own expense. Cf. *Veazie* v. *Moor*, 55 U.S. (14 How.) 567, 574 (1852). When the new channel is connected to an artery of interstate commerce—the only case that concerns us—the owner is himself deriving a substantial benefit. He is using, and sometimes distorting, the flow of the public waterway and is gaining a special access, which is presumably what motivates the undertaking. If the landowner is allowed to reserve the canal he has created exclusively to his own uses, it is not evident that any public interest is served. It is a small price that he should be required to concede a public right of passage over the extension of the existing navigable waterway. This, as we have noticed, is the statutory rule when the landowner undertakes to improve a potentially navigable channel. It is not apparent why a different result should obtain because the work involves a new channel equally connected to the national system of waterways.

There will be exceptional cases in which it is appropriate to exclude the public from a discrete body of water. But such instances are provided for by federal law and require no intervention of state authorities or resort to self-help. Thus, 33 U.S.C. 1 provides that the Secretary of the Army "shall prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property." Pursuant to this authority, the Secretary has restricted access to a number of navigable waters in or near military facilities. He has

also issued numerous regulations for the use of specific canals, locks and other facilities, including safety regulations. See generally 33 C.F.R. Part 207.

What additional special circumstances might justify a qualification or suspension of the public navigational servitude, it is unnecessary to explore. It is enough to notice that the Secretary has authority to restrict access to particular canals or artificial improvements which, in his judgment, merit special protection, but that no such restriction has been condoned in the case of respondent's canals.[19] If relief is necessary, that is the procedure to be followed. Our constitutional scheme places the navigable waters of the United States, and the public servitude which attaches to them, in the care of the nation. It is not for the State of Louisiana to purport to carve out exceptions.

[19] See note 18, *supra*. In exercising his authority under 33 U.S.C. 1, as well as other statutory provisions, the Secretary proceeds from the premise that the public has a right to navigate all navigable waters of the United States until such time as he restricts access. The Secretary has never issued any nationwide regulation affirmatively authorizing passage on all navigable waters of the United States. As mentioned, such a right of passage has always been taken for granted. The Secretary has, however, issued regulations which restrict passage on certain navigable waters of the United States. See generally 33 C.F.R. Part 207. Under these circumstances, the failure of the Secretary to issue a regulation restricting public navigation on a particular navigable water of the United States is tantamount to regulation that there should be no restriction on the public right of navigation on the waterway. Any contrary state rule must yield to the superior federal rule. See *Ray* v. *Atlantic Richfield Co.*, 425 U.S. 151, 178 (1978).

CONCLUSION

The judgment of the Louisiana Court of Appeals, Third Circuit, should be reversed, and the actions against the petitioners dismissed.

Respectfully submitted.

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APPENDIX

CORPS OF ENGINEERS' DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES (29 C.F.R. PART 329)

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters."

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers Districts and Divisions having Civil Works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters" or "navigability" are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by the Federal Courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide

and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in subparagraph (a) above; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) *Nature of Commerce: type, means, and extent of use.* The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 below, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long

as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) *Nature of commerce: interstate and intrastate.* Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same State. It is only necessary that goods may be brought from, or eventually be destined to go to, another State. (For purposes of this regulation, the term "interstate commerce hereinafter includes "foreign commmerce" as well.)

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§ 329.8 ~~Intrastate or interstate nature of waterway.~~ Improved or Natural Conditions of the Waterway.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) *Existing improvements: artificial waterbodies.*(1) An artificial channel may often constitute a navigable water of the United States, even though it has been

privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area. (See § 329.12(b).)

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) *Non-existing improvements, past or potential.* A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvements need not exist, be planned, nor even authorized; it is enough that potentially they could be

made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvements; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) *Past use.* A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) above) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are nonnavigable, or

have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) *Future or potential use.* Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" for commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

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